the action tried without a jury and insist upon the right of having the whole action tried by judge and jury.

It is true that section 65(2) speaks only of action, and not counterclaim, but the defendant cannot by counterclaiming for an amount which exceeds the value limit of the jurisdiction of the sessions court deprive the plaintiff of his right under the agreement made pursuant to the subsection to have all the issues tried by that court. In my view, section 65(2) applies to the whole action and to all the issues to be tried in the action and to everything in the counterclaim. To my mind, this view is supported by the wording of section 66(1). Under this subsection, even if the counterclaim involves matters beyond the jurisdiction of the court it could still dispose of the whole matter in controversy so far as it relates to the demand of the plaintiff and any defence thereto. The only qualification is that it has no jurisdiction to award a relief in excess of that which it has jurisdiction to award. It would have such jurisdiction only with the consent of the parties in writing.

It seems to me that section 65(2) contemplates only sections in respect of money claims or common law actions, and is not to be construed as conferring a general power to enlarge jurisdiction by consent. The parties cannot therefore by entering into a formal agreement under section 65(2) give the sessions court jurisdiction in actions, suits or proceedings relating to matters set out in section 69 of the Ordinance.

In the present case the action does not come within the categories set out in section 69. The learned president therefore had jurisdiction in view of the agreement in writing entered into between the parties under section 65(2). As he had held otherwise, it will be necessary for the respondent to apply to the court for an order of *mandamus* for the case to go back to the sessions court to be heard

This application is dismissed, but as it was made at the suggestion of the learned president, each party will bear his own costs.

Application dismissed.

Solicitors: *N. Ramachandran; Atma Singh Gill & Co.*

RE LIM LENG CHEAK, DECD.; LIM EOW THOON v. LIM KENG CHUAN & ANOR.

[O.C.J. (Ong Hock Sim J.) July 20, 1968]
[Penang — Originating Summons No. 14 of 1968]

Trusts and Trustees — Whether there was impossibility of performance.

Evidence — Estoppel — Consent order — Res judicata.

The plaintiff applied for a construction of an indenture dated September 17, 1930 and for a declaration that the trusts comprised in the said indenture had become impossible of performance as only part of the property referred to in the indenture was permitted to be used as a burial ground and consequently a resulting trust of the lands referred to in the said indenture arose in favour of the plaintiff.

A similar application was made before another judge in 1965 following the compulsory acquisition of four other pieces of land by the State government. The judge did not accept there was a resulting trust and on appeal to the Federal Court a consent order was made. It was now claimed by the plaintiff that the judgment of the trial judge was varied by the Federal Court. The defendants asserted that the plaintiff was estopped from raising the matter as the same had finally been resolved by the trial judge.

Held: the trusts created by the indenture subsisted and there was no resulting trust in favour of the plaintiff. Costs to be borne by the plaintiff personally.

ORIGINATING SUMMONS.

Ong Huck Lim for the plaintiff.

C. O. Lim for the defendants.

Cur. Adv. Vult.

Ong Hock Sim J.: The plaintiff applies for a construction of an indenture dated the 17th September 1930 and for a declaration that the trusts comprised in the said indenture have become impossible of performance and consequently a resulting trust of the above said lands arises in favour of the plaintiff. The ground for this application rests on the evidence of the Collector of Land Revenue, Penang and his letter dated 23rd September, 1966 that only part of Lot 140(1) Mk. 18, N.E.D. Penang will be permitted to be used as a burial ground. The plaintiff claims therefore there is a failure of the trust in respect of the other lands.

A similar application was made before Hepworth J. in 1965 following the compulsory acquisition of four lots by the State Government. The learned judge then did not accept the plaintiff's contention that since it is no longer possible for the lands acquired to be used as a burial ground there is a resulting trust to the plaintiff of the proceeds of the sale. The order is now set out:—

"This action coming on for trial on the 5th and 6th days of April 1965 before this court in the presence of counsel for the plaintiff for the 1st, 2nd and 3rd defendants and for the 4th, 7th and 8th defendants and upon reading the pleadings and upon hearing counsel as aforesaid IT WAS ORDERED that this action should stand for judgment and this action standing for judgment this day in the presence of counsel for the plaintiff, for the 1st, 2nd and 3rd defendants and for the 4th, 7th and 8th defendants THIS COURT DOTH ORDER that the said action be and is hereby dismissed AND THE COURT DOTH ORDER AND DECLARE as to prayer 1 of the counterclaim of the 1st, 2nd and 3rd defendants that the trust for a burial ground for the family of Lim Leng Cheak in terms of the indenture dated the 17th day of September 1930 (Registered No. 80 Volume 691) and made between Tan Say Seang Neoh of the 1st part, Lim Eow Thoon

of the 2nd part and Lim Eow Hooi, Lim Keng Chuan and Lim Seong Wah of the 3rd part subsists no order being made in respect of prayers 2, 3, 4, 5 and 6 of the counterclaim AND THE COURT DOTH FURTHER ORDER AND DECLARE as to the counterclaim of the 4th, 7th and 8th defendants that all those fourteen pieces of land and hereditaments situate in the North East District of Penang and more particularly described in the Schedule to the aforesaid indenture dated the 17th day of September 1930 (Registered No. 80 Volume 691) are held by the trustees in trust upon the terms and conditions as set out in the aforesaid indenture dated the 17th day of September 1930 (Registered No. 80 Volume 691) AND THE COURT DOTH FURTHER ORDER that the sum of $147,349.59 deposited in court together with all interest earned therefrom be paid to the 1st, 2nd and 3rd defendants as trustees of the said indenture dated the 17th day of September 1930 (Registered No. 80 Volume 691) AND IT IS FURTHER ORDERED that the costs and incidentals of the 1st, 2nd and 3rd defendants of this action and their counterclaim and the costs and incidentals of the 4th, 7th and 8th defendants of this action and of their counterclaim be taxed as between party and party on the higher scale of the Second Schedule to the Rules of the Supreme Court, 1957 and when taxed to be paid by the plaintiff to the said defendants AND IT IS FURTHER ORDERED that the costs and incidentals of the Solicitors for the 1st, 2nd and 3rd defendants be taxed as between solicitor and client on the higher scale of the Second Schedule to the Rules of the Supreme Court, 1957 and when taxed the difference between party and party costs and solicitor and client costs be paid out of the funds in the hands of the trustees AND IT IS LASTLY ORDERED that execution be stayed pending appeal and if appeal is filed then until the decision of the Court of Appeal."

The matter went on appeal to the Federal Court and a consent order in terms following was made on the 19th April, 1967:—

"1. that the costs of all parties herein and in the court below be taxed as between solicitor and client and when so taxed be paid out of funds in court.

2. that from the balance of the funds in court after paying such costs 20% thereof be paid to the trustees to be invested by them.

3. that the other 80% of such remaining balance be paid out to the appellant.

4. that this compromise is to be settlement of all outstanding claims and disputes between the parties as regards past accounts and past accounting."

It is now claimed by the plaintiff that the judgment of Hepworth J. was in effect varied by the Federal Court. The defendant however asserts that the validity of the trust has been finally adjudicated upon and the matter is *res judicata* and the plaintiff is estopped from raising the matter. The defendant contends that the consent order made by the Federal Court only had reference to the matter of costs and to the acquisition monies paid into court and did not extend to that part of the judgment that the trusts created by the indenture was still valid and subsisting. The defendant avers that even if no more burials were to be permitted, the other trusts concerning the maintenance and upkeep of all graveyards, tablets and tombs on the said hereditaments are still valid and subsisting and capable of performance. This is borne out by clause 25 of the said indenture which reads:—

"And the trustees hereby jointly and severally covenant with the confirmor his executors or administrators that they will during their lives and the life of the last survivor of them maintain and keep the said hereditaments as a burial ground for the use and benefit of the family and descendants of the said Lim Leng Cheak deceased and will not sell mortgage or otherwise dispose of the same and that they will out of the profits and income to be derived therefrom maintain and keep in good order and repair all graveyards tablets and tombs now erected or hereafter to be erected on any part thereon."

I agree and accordingly hold that the trusts created by the said indenture subsists and there is no resulting trust in favour of the plaintiff. There will be an order for costs to be paid and borne by the plaintiff personally.

Order accordingly.

Solicitors: *Ong Huck Lim & Co.; C. O. Lim & Co.*

JOHN ANAK LIMAN & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Pike C.J. (Borneo), Ismail Khan & Silke Ag. F.JJ) July 23, 1968]

[Kuching — Federal Court Criminal Appeal No. X. 5 of 1968]

Criminal Law and Procedure — Death sentence — Age of accused — Doubt as to whether at time of offence accused were of or above 18 years of age — Criminal Procedure Code (Sarawak Cap. 58), s. 219.

Penal Code, s. 300 — Murder — Accused's age — Responsibility of court.

The appellants were convicted of murder and sentenced to death. They appealed against their sentence on the ground that the court ought to have been satisfied that at the time of the offence they were of or above 18 years of age. The second appellant also appealed against his conviction on the grounds that the learned trial judge misdirected himself and the assessors on the question of common intention and abetment.

Held: (1) section 219 of the Criminal Procedure Code places a responsibility on the court to be satisfied that the appellants were not under 18 years of age. There was some doubt as to whether the appellants had attained the age of 18 years on or before the date on which the offence was committed and the court had to resolve that doubt in favour of the accused. The sentence of death should therefore be set aside;

(2) upon consideration of the summing up of the trial judge as a whole it was not so deficient on the question of common intention as to justify interference by the court;

(3) there was no merit in the ground of appeal that dealt with abetment and with aiding and abetting.

FEDERAL COURT.

George Seah for the 1st appellant.

C. T. Wong for the 2nd appellant.